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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1916.

No. [redacted]87

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY; THE CHICAGO, INDIANA & SOUTHERN RAILROAD COMPANY; AND MICHIGAN CENTRAL RAILROAD COMPANY,
Plaintiffs in Error,

vs.

SUSAN CLOUGH; THE TOLLESTON CLUB, OF CHICAGO; CHARLES G. WICKER; GOSTLIN, MEYN & COMPANY; THOMAS E. KNOTTS; LOUIS A. BRYAN; EVVA C. BRYAN; CALUMET LAND COMPANY; SOUTH BROADWAY LAND COMPANY; JOSEPH POWERS; MARY H. WICKER; AND GARY INVESTMENT COMPANY,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

SUPPLEMENTAL BRIEF AND ARGUMENT FOR THE PLAINTIFFS IN ERROR.

ROBERT J. CARY,
Of Counsel for the Plaintiffs in Error.

(NORTHROP-WARREN PRINTING COMPANY, CHICAGO.)

IN THE

Supreme Court of the United States.

October Term, A. D. 1916.

No. 406.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY; THE CHICAGO, INDIANA & SOUTHERN RAILROAD COMPANY; AND MICHIGAN CENTRAL RAILROAD COMPANY,

Plaintiffs in Error,

vs.

SUSAN CLOUGH; THE TOLLESTON CLUB, OF CHICAGO; CHARLES G. WICKER; GOSTLIN, MEYN & COMPANY; THOMAS E. KNOTTS; LOUIS A. BRYAN; EVVA C. BRYAN; CALUMET LAND COMPANY; SOUTH BROADWAY LAND COMPANY; JOSEPH POWERS; MARY H. WICKER; AND GARY INVESTMENT COMPANY,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

SUPPLEMENTAL BRIEF AND ARGUMENT FOR THE PLAINTIFFS IN ERROR.

In view of the importance of this cause, which involves issues affecting the rights and obligations of all railroad companies in the State of Indiana in respect to public drainage, it is deemed appropriate by this supplemental brief to respectfully direct the attention of this court more fully to certain legal features, which are urged by the plaintiffs in error in the brief hereby supplemented.

BRIEF.

I.

The drainage proceedings by these defendants in error against these plaintiffs in error are instituted under the Drainage Act of Indiana of 1907 (Acts, Indiana, 1907, page 508) entitled "An Act Concerning Drainage and Repealing Laws in Conflict." Under Section 21 of this act it is provided that

> "All laws and parts of laws heretofore enacted in relation to drainage are hereby repealed."

II.

Under Section 3 of this Act of 1907, it is provided that the drainage commissioners created thereunder shall

> "assess the benefits and damages, as the case may be, to each separate tract of land to be affected thereby, and to easements held by railway or other corporations, as well as to cities, towns or other public or private corporations, including any land, rights, easements or water power injuriously or beneficially affected."

III.

Under the 5th clause of Section 13 of the Act of Indiana of 1852, entitled "An Act to Provide for the Incorporation of Railroad Companies" (Section 5195, Burns' Indiana Statutes, 1914), it is provided that a railroad company shall possess the power

> "to construct its road upon or across any stream of water, watercourse, highway, railroad or canal so as not to interfere with the free use of the same, which the route of its road shall intersect, in such manner as to afford security for life and property;

but the corporation shall restore the stream or watercourse, road or highway, thus intersected, to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchises."

Substantially the same provisions are contained in Section 35 of the Act of Indiana of 1905 entitled "An Act Concerning Highways" (Acts, Indiana, 1905, page 521; Section 7683, Burns' Indiana Statutes, 1914).

IV.

The proceedings in this cause being under this Drainage Act of Indiana of 1907, which expressly repeals all laws and parts of laws theretofore enacted in relation to drainage, the rights of these plaintiffs in error in respect to damages, resulting from the drainage canal under these proceedings to be constructed, should be determined by the above quoted provisions of Section 3 of that Act, and not by the above quoted provisions of the 5th clause of the 13th section of the Railroad Incorporation Act of Indiana of 1852, or by the provisions of Section 35 of the Highway Act of Indiana of 1905.

ARGUMENT.

It is significant that the Supreme Court of Indiana, in its opinion in this cause (Transcript of Record, page 514), and in the prior decisions of that same court, bases its denial of the right of the railroad companies to damages in these drainage proceedings, not upon Section 3 of this Act of 1907 above referred to, but upon the 5th clause of Section 13 of the Act of Indiana of 1852, or upon Section 35 of the Act of Indiana of 1905 above referred to.

In *C. & E. R. R. Company* v. *Luddington*, 175 Ind., 35, 91 N. E., 939, and in *Wabash R. R. Company* v. *Jackson*, 176 Ind., 487, 95 N. E., 311, the Supreme Court of Indiana concludes that railroad companies in Indiana are not entitled to damages on account of the construction of drains across their railroads, because these railroad companies are subject, as a part of their charters, to the provisions of the 5th clause of Section 13 of the Act of Indiana of 1852, which is held to constitute a police power regulation by the State of Indiana of railroads which cross drains. These decisions also hold that the general police power of the state is the same, without reference to these specific statutory provisions, although these decisions are based primarily upon these statutory provisions.

It is respectfully urged that, while it need not be denied that, where a railroad crosses a public highway, the charter restrictions of a railroad company in Indiana, as defined in the General Railroad Incorporation Act of 1852 and the Highway Act of 1905 above referred to, are to-day as they were when those Acts were enacted, nevertheless, where a drainage improvement in Indiana is sought to be accomplished under the Drainage Act of 1907, the restrictions upon and rights of a railroad com-

pany in respect to damages are controlled by this Act of 1907, and not by these prior Acts, nor by the prior broad rule of police power, as announced in these Indiana decisions, existing prior to this Act of 1907. In short, the unlimited reservation of police power by the State, as expressed in these prior statutes or under the prior common law of the State, is, by this Drainage Act of 1907, modified by the express provisions for damages to the easements of railroad companies where drainage proceedings under this Act of 1907 are instituted. *To hold that the right of railroad companies to damages is, since the enactment of this Act of* 1907, *absolutely unchanged and that it is still governed by the legislative and common law restrictions in Indiana prevailing prior to this act, amounts to a total disregard of the express provisions of Section* 3 *of this Act of* 1907, *above quoted.*

It is manifest that the Legislature of Indiana, in modifying the broad rule of police power in respect to railroad companies where drainage proceedings under the Act of 1907 are involved, was actuated by appropriate and substantial reasons. In *C. I. & W. Ry. Company* v. *Connersville,* 170 Ind., 316, 83 N. E., 503, affirmed by the Supreme Court of the United States in 218 U. S., 336, where the Supreme Court of Indiana holds that a railroad company in Indiana is not entitled to damages when a public highway is constructed across its railroad, the court very fully and clearly analyzes the reasons why a railroad company in this respect should be subject to the police power and without compensation. As pointed out in that decision, where a railroad crosses a highway, the safety and welfare of the public using that highway is directly involved and entitled to protection at that crossing; and the property of the railroad company at that crossing must therefore be constructed and operated so

as to ensure the safety and welfare of the public using that crossing. It is, however, manifest that, where a drainage canal which is not used nor contemplated to be used as a highway, is constructed across the railroad, no question of the safety or welfare of the public at that crossing is involved. It seems entirely just to assume that the Legislature of Indiana, in creating a right of damages to railroad easements in the case of drainage canals constructed under this Drainage Act of 1907, was actuated by these reasons; and that the Legislature concluded either that, as contended by these plaintiffs in error, the principle of police power regulation is not applicable as in the case of highway crossings, or that, if applicable at all, it is so remotely applicable that the Legislature is justified in allowing to railroad easements damages fully and equally with the damages allowable to other persons and corporations. It is extremely significant, in confirmation of these conclusions, that when the Legislature of Indiana passed in 1905 this "Act Concerning Highways," the provisions of the 5th clause of Section 13 of this Railroad Incorporation Act of 1852, above quoted, were re-enacted, but when the Legislature of Indiana passed in 1907 this "Act Concerning Drainage and Repealing Laws in Conflict," it did not re-enact the provisions of this 5th clause of Section 13 of this Railroad Incorporation Act of 1852, but, on the contrary, made express provision for damages to railroad easements, and expressly repealed laws and parts of laws theretofore enacted in relation to drainage.

It is therefore respectfully urged that the Supreme Court of Indiana in this cause, in enforcing without modification against these plaintiffs in error the principles of police power regulation as expressed in the provisions of the Railroad Incorporation Act of 1852 and the Highway Act of 1905 above referred to, is wholly

disregarding the provisions of Section 3 of this Drainage Act of 1907, under which the drainage proceedings in this cause were instituted and have been conducted; that, if any damages, as expressly provided by this Act of 1907, to railroad easements may ever be appropriately and properly allowed, such damages should be allowed to these plaintiffs in error in this cause where the railroads of two of these plaintiffs in error, The Lake Shore & Michigan Southern Railway Company and the Chicago, Indiana & Southern Railroad Company, are entirely detached from and unaffected by, and do not in anywise affect, the territory by these drainage proceedings contemplated to be improved in the interests of public welfare; and that, therefore, the courts of Indiana in this cause, in refusing to permit the introduction of any proof by these plaintiffs in error or the allowance of any damages to these plaintiffs in error, are denying to these plaintiffs in error the equal protection of the law, and are taking the property of these plaintiffs in error without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

Respectfully submitted,

ROBERT J. CAREY,

Of Counsel for the Plaintiffs in Error.

IN THE

Supreme Court of the United States

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No. 87.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, THE CHICAGO, INDIANA AND SOUTHERN RAILROAD COMPANY, and MICHIGAN CENTRAL RAILROAD COMPANY,

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Defendants in Error.

In Error to the Supreme Court of the State of Indiana.

SUPPLEMENTAL BRIEF OF DEFENDANTS IN ERROR.

FURTHER STATEMENT OF FACTS.

The Chicago, Indiana and Southern Railroad Company, in addition to its eighth verified ground of remonstrance, consisting of the general allegation that the damages to its right of way are inadequate, made the following as its ninth ground of remonstrance:

> "That the damages assessed in favor of this remonstrant to its right of way in Section 36, Township 37, Range 7, in Porter County, Indi-

ana, *are inadequate in this:* that the construction of said proposed ditch will result in cutting a great canal through remonstrant's right of way, where it now maintains its main tracks of railroad, 190 feet wide on top, 70 feet wide on bottom, and 30 feet deep, that the land where said ditch will cross right of way is loose sand and will cave in and run while the excavating is being done and in order to construct a ditch of the depth required the top thereof will be at least 190 feet wide, requiring a bridge over the same at least 190 feet long, which will cost, for construction, the sum of $131,000, and a capitalization of $80,000 for its maintenance, that remonstrant will be required to detour its trains during the construction of said bridge for a period of 365 days, which will cost the remonstrant the sum of $2,500, and remonstrant will suffer other damages on account of the taking and appropriating the right of way, interruption and loss of its business in the sum of $10,000. Wherefore, it will suffer damages, by reason of the location and construction of said ditch in the aggregate sum of $223,500, that where said ditch will cross said right of way no bridge is now required, the superstructure of its railroad being a solid embankment." (Printed Rec., 275.)

The remonstrance concludes thus:

"Wherefore, said remonstrant prays the court that * * * it be allowed as damages the cost and maintenance of said bridge, and that damages awarded it on account of injury to its right of way in Section 36, Township 37, Range 7, Porter County, Indiana, *be increased in all to the sum of $223,500,* and ordered paid to it as provided by law, and for all other proper relief." (Printed Rec., 276.)

The Lake Shore and Michigan Southern Railway

Company, in additon to its seventh verified ground of remonstrance, consisting of the general allegation that the damages to its right of way are inadequate, made the following its eighth ground of remonstrance:

> "That the damages assessed in favor of this remonstrant to its right of way in Section 36, Township 37, Range 7, in Porter County, Indiana, *are inadequate in this:* That the construction of said proposed ditch will result in cutting a great canal through remonstrant's right of way, where it now maintains two main tracks 210 feet wide at top and 70 feet wide on the bottom, and 34 feet deep; that the land where said ditch will cross said right of way is lose sand and will cave in and run while the excavating is being done, and in order to construct a ditch of the depth required the top will be at least 210 feet wide, requiring a bridge over the same at least 210 feet long, which will cost, for the construction, the sum of $150,000, and a capitalization of $80,000 for its maintenance, and this remonstrant will be required to detour its trains during the construction of said bridge for a period of 365 days, which will cost the remonstrant the sum of $3,000, and remonstrant will suffer other damages on account of the taking and appropriating portions of its right of way, of interruption and loss of its business in the sum of $10,000; wherefore, it will suffer damages by reason of location and construction of said ditch in the aggregate sum of $243,000, that where said ditch will cross said right of way no bridge is now required, the superstructure being a solid embankment." (Printed Rec., 285.)

The remonstrance concludes thus:

> "Wherefore said remonstrant prays the court that * * * the damages awarded it on account of injury to its right of way in Section

36, Township 37, Range 7, Porter County, Indiana, *be increased to $243,000,* and for all other proper relief." (Printed Rec., 285.)

There was no award of damages in the report of the Commissioners as to the Michigan Central Railroad Company, but it remonstrated for damages. (Printed Rec., 277.)

The Supreme Court of Indiana, after stating that the plaintiffs in error remonstrated on the grounds provided for in Section 4 of the Drainage Act, uses this language:

> "The ninth cause of remonstrance of the Chicago, Indiana and Southern Ry. Co. set forth that the construction of the ditch across its railroad, 70 feet wide at the bottom and 30 feet deep, would require this appellant to bridge the same at a cost of $131,000. The eighth cause of remonstrance of the Michigan Central Railroad Company set forth that the construction of the ditch under its bridge would require the same to be taken down and new abutments constructed, which would cost the sum of $63,700. The eighth cause of remonstrance of the Lake Shore and Michigan Southern R. R. Co. set out that the ditch proposed across its tracks would be 70 feet wide at the bottom, 34 feet deep and 210 feet wide at the top; that it would be required to construct a double tracked bridge thereover at a cost of $150,000. The prayer of each remonstrator was that the proceedings be dismissed; and if not, *then that the remonstrators be allowed damages, incident to and necessary in the matter of the bridges as aforesaid.*" (Printed Rec., 511.)

POINTS AND AUTHORITIES.

I.

ninth specification of the Chicago, Indiana and Southern Railroad Company's verified remonstrance, and the eighth specification of the Lake Shore & Michigan Southern Railway Company's verified remonstrance, each respectively constituted an enumeration of the items of asserted damages, and, when taken in connection with the prayer for relief, wherein the remonstrator asks that the damages awarded be increased to a certain sum, that sum being the total of the amounts specified in the preceding specification of each of the remonstrators, leads to the inference that such specification of damages constituted the entire damage and was, in effect, an admission, owing to a failure to make claim for it, that the easement was not injured.

II.

While a party may with safety adopt the statutory form, yet if he adds to it specific facts, exhibiting the nature of his asserted claim, he must state such facts as show that his claim rests on substantial grounds.

Reynolds v. *Copeland,* 71 Ind., 422, 424.

III.

When the specific allegations of fact contradict the general allegations, the specific allegations control.

Cleveland, etc., R. Co. v. *Cyr,* 43 Ind. App., 19, 21.

IV.

A party who has failed to assert a claim, in circumstances fairly calling on him so to do, impliedly admits that such claim was without basis.

Chamberlayne, Mod. Law of Ev., Sec. 1395.

V.

A party may show that his adversary who now claims a certain right has in the past done acts inconsistent with the actual existence of such right as is now set up, and that he has failed to assert his claim on occasions when such a course would be proper.

Chamberlayne, Mod. Law of Ev., Sec. 1395.

VI.

Admissions of parties in pleadings are denominated solemn admissions, or admissions *in judico*, and may be considered by the court without being introduced in evidence.

New Albany, etc., R. Co. v. *Stallcup*, 62 Ind., 345.

Colter v. *Calloway*, 68 Ind., 219, 223.

VII.

The language of the Supreme Court of Indiana (Rec., 511) shows that that court, in view of the specific claims set forth in each of the remonstrances and the pryaer thereof, considered the question sought to be presented as a question as to the rights of the remonstrators to be *"allowed damages incident to and necessary in the matter of the bridges,"*

and the subsequent language of the court is therefore to be treated as having reference to such damages.

VIII.

If on the trial the plaintiffs in error had desired an award of damages for injury to easements, they should have offered evidence going to segregate their damages, if any, in that particular, and if necessary they should, *in limine*, have called the attention of the court to the matter. Nothing was done in respect thereto "which would show that counsel for the plaintiff in error had any such objection in mind, and he cannot argue an objection here which was never taken in the trial court."

Mercantile Trust Co. v. *Hensey*, 205 U. S., 298; 51 Law Ed., 811, 814.

IX.

"It is part of the duty of a plaintiff in error affirmatively to show that error was committed. Error is not to be presumed, and will not be inferred from a doubtful statement in the record."

Mercantile Trust Co. v. *Hensey*, 205 U. S., 298; 51 Law Ed., 811, 814.

Bear Lake, etc., Co. v. *Garland*, 164 U. S., 1; 41 Law Ed., 327, 336.

Rogers v. *Schooner S. B. Wheeler*, 20 Wall., 385; 22 Law Ed., 385.

X.

Plaintiffs in error, being under a statutory as well as a charter obligation, to build their own bridges, and that being the subject-matter of their contentions in the trial court and in the Supreme Court of Indiana, the latter court correctly announced as a proposition of law that the taking (having reference to the occasioning the necessity of building bridges) was by virtue of the police power.

XI.

Why should this court, sitting two removes from the trial court, consider any narrow question of inferences to be drawn from evidence, where the complaining parties have "carefully, cautiously and designedly refrained from shedding any light thereon or offering any evidence in regard thereto"?

Pacific Coast S. S. Co. v. *Bancroft Whitney Co.*, 94 Fed., 180, 199.

Turner v. *New York*, 168 U. S., 90; 42 Law Ed., 392, 394.

XII.

The record before the court does not show that the report of the drainage commissioners was introduced in evidence. The statute (Acts 1907, p. 533) provides, "The reports of the drainage commissioners shall be *prima facie* evidence of the facts stated in such reports." This does not make the document, *ex proprio vigore*, evidence in the case. Under this statute it is a practice repeatedly recognized by the Supreme Court of Indiana as proper to introduce the report in evidence, for otherwise it

stands as a mere matter of opinion on the part of the drainage commissioners.

Wilson v. *Tevis* (Ind. Sup.), 111 N. E., 181, 183.
Katterhenry v. *Arensman*, 183 Ind., 347, 353.
Shields v. *Pyles*, 180 Ind., 71, 80.
Seybold v. *Rehwald*, 177 Ind., 301, 310.
Zehner v. *Milner*, 172 Ind., 493, 501.
Bohr v. *Neuenschwander*, 120 Ind., 449.

And see:

McKaig v. *Jordan*, 172 Ind., 84, 88.

Respectfully submitted.

JOHN H. GILLETT,
FRANK B. PATTEE,
RANDALL W. BURNS,
Attorneys for Defendants in Error.

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Plaintiffs in Error,

vs.

SUSAN CLOUGH, THE TOLLESTON CLUB OF CHICAGO, CHARLES G. WICKER, GOSTLIN, MEYN & COMPANY, THOMAS E. KNOTTS, LOUIS A. BRYAN, EVVA C. BRYAN, CALUMET LAND COMPANY, SOUTH BROADWAY LAND COMPANY, JOSEPH POWERS, MARY H. WICKER, and GARY INVESTMENT COMPANY,

Defendants in Error.

In Error to the Supreme Court of the State of Indiana.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

PARTIAL STATEMENT OF FACTS.

Plaintiffs in error, at pages 10 to 25 of their brief, set forth in full the twenty findings of fact made by the trial court. These should be consulted for a full and correct understanding of the facts.

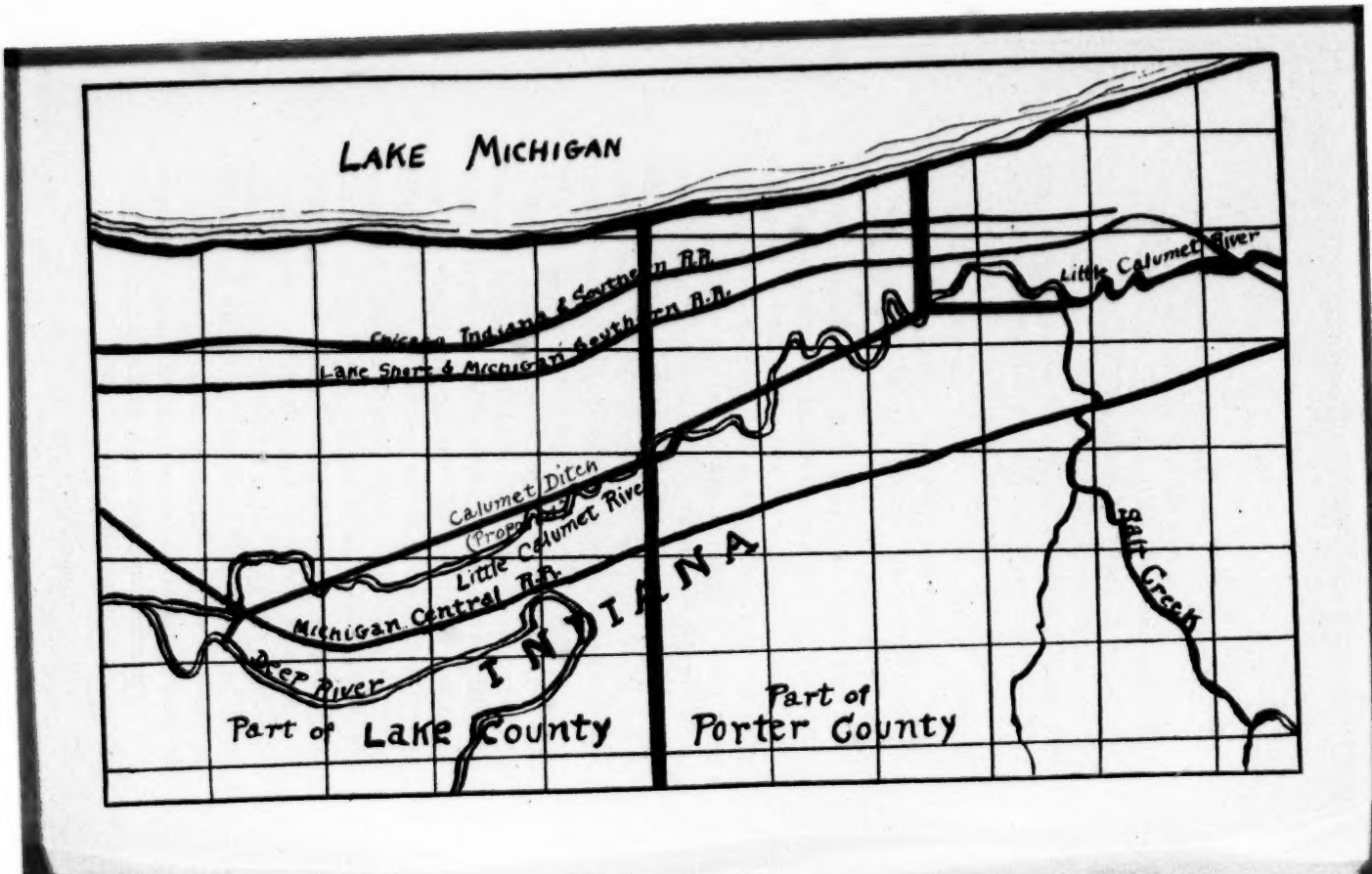
Plaintiffs in error, on page 3 of brief, give the area of the watershed to be drained as 350,000 square miles, whereas it is 350 square miles. (Printed Tr., 302.) They also say, on page 3 of their brief, that the marsh to be drained contains 13,000 acres, whereas it contains 14,000 acres. (Tr., 306.)

We call attention especially to a few facts which

reveal features not brought out, very clearly, in the statement made by plaintiffs in error.

The source of the Little Calumet river is in La-Porte County, Indiana, it runs westerly parallel with the south shore of Lake Michigan across Porter and Lake Counties, enters the State of Illinois and flows thence westerly and northerly into the Big Grand Calumet river, which river empties into Lake Michigan at South Chicago. The Little Calumet river, where it crosses the west half of Porter county, and the full width of Lake County, is skirted by a marsh averaging from a mile to a mile and a half in width. Between the valley of this river and Lake Michigan there is a long narrow ridge of land about thirty (30) feet above the level of Lake Michigan, and about ten (10) feet above the Little Calumet river. This ridge is one and two-tenths (1.2) miles wide at the point where it is crossed by the proposed ditch. This river has no tributaries from the north, and none from the south west of Deep river, hereinafter mentioned, until the Hart ditch is reached, which is in the western part of Lake County.

By the proposed drain, a cut is made beginning at the south shore of Lake Michigan and extending thence south 1.2 miles across said narrow ridge of land to intersect the Little Calumet river and thereby divert its head waters, out of their natural course, and into Lake Michigan, thus furnishing an outlet for all of the head waters of said river into Lake Michigan. In its natural course, the waters of the river must travel through a winding, inadequate channel a distance of 54 miles into the same lake. That part of the ditch extending from the Little Calumet river to Lake Michigan will be 70 feet wide on the bottom, and in some of the widest places 200 feet wide on top, and more than 30 feet deep.


LAKE MICHIGAN
Chicago Indiana & Southern R.R.
Lake Shore & Michigan Southern R.R.
Little Calumet River
Calumet Ditch
(Proposed)
Little Calumet River
Michigan Central R.R.
Deep River
INDIANA
Salt Creek
Part of Lake County
Part of Porter County

There are two arms of said ditch; one extends easterly to Salt creek and the other westerly following the course of the Little Calumet river, passing under the Michigan Central railroad bridge and intersecting Deep river about four and three-quarters miles west of Porter County. The purpose of said arms is to conduct the water from both directions into the outlet into Lake Michigan.

The proposed work will improve the public health. It will benefit public highways in Calumet Township, North Township, Town of East Gary, streets and highways in the City of Gary, highways in Portage and Westchester Townships and will be of public utility. At least one large city, that of Gary, is within the district to be drained, and marsh extends through North Township in Lake County, which contains three large cities, Hammond, East Chicago and Whiting.

The bridges to be constructed by said plaintiffs in error, Lake Shore & Michigan Southern Railway Company and Chicago, Indiana & Southern Railway Company, are to have 86 foot clear spans. The channel of the river under the bridge of the plaintiff in error, Michigan Central Railroad Company, will be deepened about 7 or 8 feet, which will necessitate the rebuilding of the abutments and piers upon which the bridge rests.

Said plaintiffs in error are not charged with any of the cost of the construction of said ditch or the removal of the dirt necessary for the passage of the water through the rights of way of said railways.

The following map is drawn for the purpose of merely showing the location of said plaintiffs in error's railways to the line of the proposed ditch and the Little Calumet river, and the general direction the lines of the proposed ditch take, as set forth in the statement of facts.

The Issues.

The plaintiffs in error, by their respective remonstrances, claim damages to their rights of way, for the cost of construction of new bridges, for the expense of detouring trains and for the capitalization and maintenance of bridges, etc. (Printed Tr., pp. 275, 280 and 285.)

Numerous land owners assessed with benefits filed statutory remonstrances against awards of damages by the Commissioners to the plaintiffs in error, Lake Shore & Michigan Southern Railway Company and Chicago, Indiana & Southern Railroad Company (none having been awarded the Michigan Central Railroad Company), on the ground that the damages awarded them by the Commissioners in the report were excessive and unauthorized by law, and insisted that said damages should be disallowed. (Printed Tr., pp. 268, 270, 287, 288, 292 and 297.)

It will, therefore, be seen that the question of damages of the plaintiffs in error was put in issue by them respectively by affirmative grounds of remonstrance and that the question was tried out. The burden of that issue rested upon plaintiffs in error under their affirmative claims of damages in their respective remonstrances, and the only evidence any of them sought to introduce to support the issue thus made was that of actual cost of the construction of new bridges. They did not offer or attempt to prove any damage to their rights of way or easements, and on that issue they failed in their proof. (Printed Tr., pp. 355, 359, 385 and 386.)

We call attention to the fact that the extravagant

sums of money that plaintiffs in error contended would be necessary to cover the cost of the building of bridges were simply statements of counsel in offers to prove damages, and that there was no evidence actually introduced to show what the cost of bridges would be. Defendants in error showed that each of the crossings was at a right angle of a railroad right of way one hundred feet wide; that not more than two tracks would be crossed in any instance, and that the companies had no other lands or easements except their said rights of way. (Printed Tr., p. 355 *et seq.*)

DECISION OF THE SUPREME COURT OF INDIANA

IN THE CASE OF

LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY ET AL. VS. SUSAN CLOUGH ET AL.

Appealed from the Porter Circuit Court.

Come the parties by their attorneys, and the court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by ERWIN, J.:

This is a proceeding brought by appellees, by petition filed in the Circuit Court of Porter County, in which it is sought to change the course of the Little Calumet river, and make a cut off from the line of said river, as it now runs, so as to run in a northerly direction into Lake Michigan, across a high ridge of land, on which are situated appellants' right of ways, and make a drain in some places two hundred feet wide at the top and more than thirty feet deep.

To this petition a demurrer was filed by each of the appellants, on the grounds: 1. That the same does not state facts sufficient to constitute a sufficient petition in the drainage proceeding. 2. That all the lands to be affected are not described in forty-acre tracts. 3. That all the lands to be affected are not described in said petition.

The demurrers were overruled and exceptions saved. Subsequently the petition was referred to the Drainage Commissioners of Porter County, and A. P. Milton of Lake County. At the March term

following the Commissioners made and filed their report.

In the report of the Commissioners they established, in addition to the drain prayed for in the petition, certain arms, or lateral drains, one the Salt Creek arm, and the other the Gary arm. After the report was filed, each of the appellees filed remonstrances. At the October term of 1909 the cause came on for trial, when it was discovered that by including the "Gary Arm" it would make the greater length of the drain in Lake County; whereupon the appellants and each of them moved the court to dismiss the petition on the grounds that the jurisdiction of the drain was in Lake County and the Porter Circuit Court had no jurisdiction. The court, pending the motion to dismiss, and on motion of petitioners, permitted the Commissioners to make such amendments to their report as would exclude the "Gary Arm" and thus leave the greater portion of the ditch in Porter County, and directed the Commissioners to make reports at the following December term of the court, to which ruling appellants each reserved an exception.

At the December term the Commissioners, pursuant to the order of the court, made a report in which the proposed drain was left at 22,300 feet in Lake County and 29,650 feet in Porter County. In this second report damages were awarded to the appellants, as follows: To the Chicago, Indiana and Southern Ry. Co. $17,000; to the Lake Shore and Michigan So. Ry. Co. $35,000.

To this report the several appellants filed remonstrances, each setting forth substantially the

same grounds, being those provided in Section 4 of the Drainage Act of 1907, and in addition to the several causes of remonstrances, they set forth the proceeding and order of the court in referring the report back to the Commissioners for correction.

The ninth cause of remonstrance of the Chicago, Indiana and Southern Ry. Co. set forth that the construction of the ditch across its railroad 70 feet wide at the bottom and 30 feet deep would require this appellant to bridge the same at a cost of $131,000.

The eighth cause of remonstrance of the Michigan Central Railroad Company set forth that the construction of the ditch under its bridge would require the same to be taken down and new abutments constructed, which would cost the sum of $63,700.

The eighth cause of remonstrance of the Lake Shore and Michigan Southern R. R. Co. set out that the ditch proposed across its tracks would be 70 feet wide at the bottom, 34 feet deep and 210 feet wide at the top; that it would be required to construct a double tracked bridge thereover at a cost of $150,000. The prayer of each remonstrator was that the proceedings be dismissed; and if not, then that the remonstrators be allowed damages, incident to and necessary in the matter of the bridges, as aforesaid.

A trial was had, and upon timely request by appellants the court made special findings of facts and stated its conclusions of law thereon.

The decree established the work and provided for its construction. At the same time the court struck from the Commissioners' report the several allowances of damages consequent upon the construction

of the work and rendered judgment against each appellant.

The court found the facts to be that the Calumet River would, by said proposed work, be changed from its present course so as to run northerly into Lake Michigan; that between the river and Lake Michigan there is a ridge of sandy land, averaging about thirty feet above the level of the lake and about ten feet above the river valley; that the said ridge is a little more than a mile wide; that the total area to be drained by the proposed ditch will be three hundred fifty square miles; that the petitioners are the owners of lands which they desire to drain; that the lands lie outside the corporate limits of any city or town; that the same cannot be drained without affecting the lands of others; that each tract will be benefited by the proposed drain. Then follows a description of the proposed drain by courses and distances, and of each arm, with the length of the drain in each county through which it runs; that many years ago the Lake Shore and Michigan Southern had constructed along said ridge between the river and the lake a double track railroad and are still operating said road; that the Chicago, Indiana and Southern also own and maintain a single track line of road upon said ridge parallel with the Lake Shore road; that the cost of construction of said drain is $314,398.98; and that the benefits are $335,264.69; that the proposed work will improve public highways, benefit the public health and will be of public utility; that it will be sufficient to properly drain the lands affected; that the Chicago, Indiana and Southern own its right of way 100 feet

wide; that the proposed drain will cross the right of ways of the appellants at right angle; that it will be necessary for each of appellants to construct new bridges across the proposed drain; that a bridge at least 86 feet long will be required by the appellants; that there is not now and never has been any ditch, drain or water course where the proposed drain crosses the Lake Shore and Michigan Southern and Michigan Central Roads; that appellants have no other real estate in said counties benefited or damaged by said proposed drain.

Upon the foregoing facts the court stated the law to be, that the appellants should not be charged with benefits for the right of way, and that said appellants are not entitled to recover any damages by reason of the construction of the proposed work; that the work is of public utility and should be constructed.

To each of the conclusions of law the appellants jointly and severally excepted.

The questions presented by the record in this case are: 1. Error in overruling appellants' demurrers. 2. Error in overruling appellants' motion to dismiss. 3. That the Calumet river being an interstate stream, the Porter Circuit Court had no jurisdiction over its course. 4. Appellants' railways not being within the drainage district are not subject to the police power of the state. 5. That the power to cut the ditch across appellants' right of way is referable to the Eminent Domain power and not the police power. 6. That the drainage act of 1907, Sec. 6142 *et seq.*, Burns' 1908, is unconstitutional and void in that it allows the assessment of

damages to Lake County for injuries to bridges; to other corporations and persons for injuries to their property, while denying the same to appellants, and is in conflict with the fourteenth amendment to the Federal Constitution.

It is contended by appellants that the petition is insufficient for the reason that it does not comply with the statutes as to the description of the lands alleged to be affected by the proposed drainage and does not describe the land in forty acre tracts. While the petition might have been drawn more artistically and certain, yet as the law pertaining to drainage must be liberally construed to affect the ends sought we are of the opinion that the petition meets all the requirements of the statutes and is sufficient to withstand demurrer. Burns' 1908, Sec. 6148; *Stevens* v. *Templeton,* 170 Ind., 248-251; *Righter* v. *Keaton,* 170 Ind., 461-466; *Osborn* v. *Maxinkuck, etc.,* 154 Ind., 101-106; *Rodgers* v. *Voorhees,* 124 Ind., 469; *Hick* v. *Voight,* 110 Ind., 279-282.

No exact certainty is required in this form of pleading in a ditch proceeding. If it contains the allegation required by the statute it will be deemed sufficient. Burns' 1908, Sec. 6141; *Shields* v. *McMahan,* 101 Ind., 591; *Heick* v. *Voight,* 100 Ind., 279.

The second proposition presented is based upon the trial court's refusal to dismiss the petition on the grounds that the report of the commissioners to whom the matter has been referred, showed that they had, in laying out the drain, provided for certain arms, to the drain, as described in the petition as originally filed; thus making the greater length of the drain, including laterals, in Lake County, and

that by so doing the Porter Circuit Court had been ousted of its jurisdiction.

It is not contended that the Porter Circuit Court had jurisdiction in drainage proceedings, nor do appellants contend that anything in the petition as originally filed deprives the Porter Circuit Court of jurisdiction in this particular matter.

Where the subject matter of any suit is situated in two or more counties, the court which first takes jurisdiction shall retain the same.

Burns' 1908, Sec. 1438.
Hart v. *Scott*, 168 Ind., 530.

There is reason for the rule in this kind of a proceeding. The petition filed in this case showed the greater length of the proposed drain in Porter County, and gave that court jurisdiction to act, which it did in appointing the Commissioners. These Commissioners, in addition to the drain as described in the petition added thereto certain other lateral drains which made the greater length in Lake County. Now suppose the petitioners had filed their petition in Lake County and in their petition had included the several arms, but when the Commissioners undertook to lay out and establish the drain, they found that it would be impracticable to include the several proposed arms, and by excluding them, the greater length of the drain would be in Porter County, then upon appellants' theory, a motion being made to dismiss, the cause had been dismissed and transferred to Porter County and new Commissioners had been appointed, who did what the Commissioners in this case did, the

jurisdiction of the case would be made to depend upon the action of the Commissioners, and their judgment as to what should or should not be included in the system of drainage, in the way of lateral drains.

The jurisdiction of the subject matter of any controversy in any court must be determined in the first instance by the petition or complaint, and where once rightfully acquired cannot be taken away by the bare fact that the Commissioners added to the drain as originally prayed for, some addition or lateral drains, this would not oust the jurisdiction of the court as to the drain mentioned in the petition and would be no grounds for dismissing the whole proceedings.

The court trying this case permitted the amendment of the report of the Commissioners so as to cut off a part of the arms of the drain in Lake County, and as finally tried and disposed of as shown by the finding of facts, had its greater length in Porter County.

It is next contended by appellants that the Porter Circuit Court had no authority to divert the course of the Calumet River, as the same was an interstate stream.

In all the cases cited by appellants on this proposition some questions of interstate rights were involved, or at least an individual right presented by some party affected.

We do not understand that remonstrators are permitted to complain of any action of the court in any matter which does not interfere with their own rights, or in any way affect them.

Unless the party is aggrieved by the judgment of

the court he has no standing in his appeal, however much it may affect others.

McFarland et al. v. *Pierce et al.*, 151 Ind., 546-548.

Marshall v. *Watson*, 171 Ind., 238.

It is further contended by appellants that as the line of their easements are not within the proposed drainage district, they are not subject to the police power of the State, but the matter is referable to the Eminent Domain power, and that appellants are entitled to damages for the construction of bridges occasioned by the drain.

This is not a new question in Indiana. It has been decided by this court that the construction of drains and highways and the taking of property for such purposes is within the police power of the State.

Cincinnati, etc., R. Co. v. *Connersville*, 170 Ind., 316; Affirmed by Supreme Court, 218 U. S., 336.

Chicago & E. R. Co. v. *Jackson et al.*, 176 Ind., 487.

Valparaiso v. *Heggan*, 153 Ind., 337.

P., C., C. & St. L. v. *Gregg*, 102 N. E., 961.

To the same effect see

Hudson, etc., Co. v. *McArthur*, 209 U. S., 349.

New Orleans, etc., Co. v. *Drainage Comm.*, 198 U. S., 453.

City of Minneapolis v. *St. Paul, etc., Co.*, 98 Minn., 380; 28 L. R. A. (N. S.), 298.

Chicago, Milwaukee & St. Paul R. Co. v. *City of Minneapolis*, 232 Sup. Ct. Rep (U. S.), page 430, decided Feb'y 24, 1914

In the recent cases of *Chicago, etc., R. Co.* v. *Luddington,* 175 Ind., 35, and *Wabash R. Co.* v. *Jackson, supra,* the exact question here presented was decided by this court adversely to appellants' contention, holding that the same rule applied to the construction of drains, as that of highways.

In each of those cases the authorities on the subject of the right to have damages awarded have been fully collated, and commented upon, and support the judgment in this case. These decisions are in line with *State ex rel.* v. *St. Paul, etc., R. Co.,* 98 Minn., *supra,* cited with approval by the Supreme Court of the United States in *C., M. & St. P. R. Co.* v. *City of Minneapolis, supra.*

In the last case cited the question arose whether the railroad company was entitled to compensation for the cost of erecting and maintaining a bridge across a gap in the right of way, made by building a canal connecting two lakes on opposite sides of said right of way; the court holding that it was not entitled to recover and that the taking without compensation was not in violation of the Federal Constitution. It might, therefore, follow that the act of March 11, 1907, being Section 6140, *et seq.,* is not in conflict with the fourteenth amendment to the Federal Constitution.

What we have heretofore said in this opinion disposes of the questions presented by the motion for a new trial.

Judgment affirmed.

It was stipulated that each of the plaintiffs in error were railroads, organized, operating and existing under the statute of Indiana which went into

force on May 6, 1853, concerning railroads, and was then published in the Revised Statutes of 1852 at p. 449, and the amendments thereto. (Printed Tr., p. 355.)

STATUTORY ENACTMENTS OF THE STATE OF INDIANA.

In addition to the summary of the Drainage Law set forth in briefs of plaintiffs in error, we call attention to the following provisions of the Drainage Act, being part of Sec. 6142 of Burns' Revised Statutes of Indiana, 1914, the same being part of the Drainage Act passed in 1907, which read as follows:

> "But if they [the Drainage Commissioners] find otherwise they shall proceed and definitely determine the best and cheapest method of drainage, the termini and route, location and character of the proposed work, and fix the same by metes and bounds, courses and distance and description, including grades and bench marks, including all necessary arms, estimate the cost thereof, divide the drain or ditch into sections not more than one hundred feet in length, and compute and set out the number of cubic yards of excavation in each section, assess the benefits or damages as the case may be to each separate tract of land to be affected thereby, and to easements held by railway or other corporations, as well as to cities, towns, or other public or private corporations, including any land rights, easements or water power injuriously or beneficially affected, and to make report to the court, under oath, as directed: Provided, also, that when any ditch, drain or levee runs into another county than the one where such proceeding therefor as aforesaid are instituted, no bridge, culvert or road in such other county shall be destroyed, injured or interfered with, unless the damage to be occasioned thereby to such bridge,

culvert or road has been considered, estimated and assessed by the said Drainage Commissioners and the payment of such damages to such county provided for by assessing the same pro rata as other damages are assessed. The Drainage Commissioners, in locating the line or lines of work of drainage, may vary from the line described in the petition as they deem best, and may fix the beginning or outlet so as to secure the best results; they may run the line so as to avoid all injury possible to lands, easements or public grounds and so as to benefit public highways, streets or alleys, by using the earth excavated for roadbeds, or in any other way they deem best: Provided, that in no case shall they change or construct the work as to sacrifice the best interests of such work or drainage. They may determine that the method of drainage shall be by removing obstructions from a natural or artificial watercourse; or diverting such watercourse from its channel, by deepening, widening or changing the channel of such watercourse; by constructing an artificial channel, with or without arms or branches; by providing that said work may be the tiling of an already existing public open drain or tiling an already existing public open drain and constructing as a part of said work a new drain; by providing that such drain shall be open or tiled and covered, or partly open and partly tiled and dug by shovel, dredge or otherwise; by constructing levees or dykes; or by any or all of such methods combined."

In Sec. 6143 of said statute above referred to parties named in the drainage report as benefited or damaged are given the right to remonstrate on the ground that damages assessed to any specified tract of land are exorbitant, that the damages awarded to the remonstrator complaining are inadequate and

on the ground that the remonstrator will be damaged by the construction of the proposed work. Provision is then made for a trial on the issues thus tendered by the court and for the entry of a finding and judgment, in accordance with the rights of the parties.

Subdivision 5 of Sec. 13 of the General Railway Act of May 6, 1853, now known as Sec. 5195 Burns' Revised Statute of 1914, which is the act under which plaintiffs in error hold their charter rights from the State of Indiana, reads as follows:

> "To construct its road upon or across any stream of water, watercourse, road, highway, railroad or canal, so as not to interfere with the free use of the same, which the route of its road shall intersect, in such manner as to afford security for life and property; but the corporation shall restore the stream or watercourse, road or highway, thus intersected, to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchises."

Sec. 7683 of Burns' Revised Statutes of Indiana for 1914, the same being Sec. 35 of the Act of the General Assembly of Indiana for 1905, p. 521, contains the following provision:

> "Every steam or electric railroad company shall have the right to construct its railroad across any stream, watercourse, road, highway, railroad or canal which the route of its road shall intersect, in such manner as not to interfere with the free use of the same and so as to afford security for life and property; but such railroad corporation shall restore and maintain the stream or watercourse, road, highway or canal, thus intersected, to and in its former state, or in a sufficient manner not unnecessarily to impair its usefulness or injure its franchises."

POINTS AND AUTHORITIES.

I.

Under the express conditions of Section 5195, Burns, 1914, the same being in a section of the Railroad Act constituting the charter of each of the plaintiffs in error, as well as by reason of the implication from the legislative grant, it was their duty, without compensation, to restore their own bridges. The rule applies alike to highways and to streams and water-courses, and the subject is interlocked, by the provisions of said section and by the decisions of the Supreme Court of Indiana, including the case at bar.

Louisville, etc., R. Co. v. *Smith,* 91 Ind., 119, 121;

Evansville, etc., R. Co. v. *State, ex rel.,* 149 Ind., 276, 279;

Lake Erie, etc., R. Co. v. *Shelley,* 163 Ind., 36;

Southern Ind. R. Co. v. *McCarrell,* 163 Ind., 469, 473;

Vandalia R. Co. v. *State, ex rel.,* 166 Ind., 219;

Cincinnati, etc., R. Co. v. *Connersville,* 170 Ind., 316;

New York, etc., R. Co. v. *Rhodes,* 171 Ind., 521, 525;

Pittsburgh, etc., R. Co. v. *Gregg,* 181 Ind., 42, 53;

Chicago, etc., R. Co. v. *Luddington,* 175 Ind., 35;

Wabash R. Co. v. *Jackson,* 176 Ind., 487.

II.

The Indiana construction of Section 5195, Burns, 1914, has been upheld as gainst Federal objection.

Cincinnati, etc., R. Co. v. *Connersville,* 218 U. S., 336.

III.

In the opinion of the Indiana Supreme Court in the case at bar, it appears that that court rested its entire judgment on the doctrine of charter obligation, as laid down in two of the above cases, and therefore, it appears that the decision rests on a state ground, which this court will not undertake to revise.

Keokee, etc., Co. v. *Taylor,* 234 U. S., 224; 58 Law Ed., 1288.

IV.

In view of the record proper, which shows that the state statute was of controlling importance in the case, this court will not indulge any further inference which might justify its taking jurisdiction on another possible Federal ground.

Johnson v. *Risk,* 137 U. S., 300; 34 Law Ed., 683.

V.

The theory of charter obligation, as justifying a denial of compensation for bridges, has been recognized by this court.

Cincinnati, etc., R. Co. v. *Connersville,* 218 U. S., 336; 54 Law Ed., 1060;

Chicago, etc., R. Co. v. *Minneapolis,* 232 U. S., 430; 58 L. Ed., 671;

State v. *St. Paul, etc., R. Co.,* 214 U. S., 497.

Northern Pacific R. Co. v. *State,* 208 U. S., 583.

VI.

Public highways and public drains stand on the same footing, so far as concerns the matter of charter obligation, and are alike within the authority of the state to exert its police power in determining upon their construction.

Hagar v. *Reclamation District,* 111 U. S., 701; 28 L. Ed., 569;

Fall Brook Irrigation v. *Bradley,* 164 U. S., 112; 41 L. Ed., 369, 390;

Chicago, etc., R. Co. v. *Luddington,* 175 Ind., 35, 38.

VII.

The decisions on which the Indiana Supreme Court in the case at bar rested its judgment, are cases in which the doctrine of charter obligation, in the matter of building bridges at the expense of railroad companies, was laid down unqualifiedly, as applied to all public drains, and there is no such thing, under the law of Indiana, as a drainage district, saving as property may be affected, prejudicially or otherwise, by the construction of the drain, and it is for the drainage commissioners alone to determine the best and cheapest route.

Chicago, etc., R. Co. v. *Luddington,* 175 Ind., 35, 38;

Wabash R. Co. v. *Jackson,* 176 Ind., 487;

Section 6142, Burns, 1914.

VIII.

The decision in the case at bar is as effectual as any other could be to determine the meaning of Section 5195, *supra*.

IX.

Plaintiffs in error had, and assumed, the burden on damages; they did not present any question in the trial of compensation for easements; no evidence was offered going to show damage on account of an interference therewith; the evidence in the record fully warranted the finding that there was no damage, and the Supreme Court of Indiana passed on no other question, relative to damage, except as it related to expense of building bridges, and therefore it must be said that no error appears, both because the question of damages to easements was not raised or presented at any point in the trial, and because the trial court's decision that there was no damage is a finding of fact which this court will not go behind in a writ of error.

Chicago, etc., R. Co. v. *Chicago,* 166 U. S., 226; 41 L. Ed., 979;

Waters-Pierce Oil Co. v. *Texas,* 212 U. S., 86; 53 L. Ed., 417, 424;

Thayer v. *Spratt,* 189 U. S., 346; 47 L. Ed., 845, 849;

Conwell v. *Tate,* 107 Ind., 171;

Rogers v. *Venis,* 137 Ind., 221;

Stevens v. *Templeton,* 174 Ind., 129, 133;

Indianapolis, etc., R. Co. v. *Wiles,* 176 Ind., 236, 238.

X.

Any declaration of law, made by the Supreme Court of Indiana in the case at bar, is a declaration which must be understood as confined to the facts as presented in the case before it.

Lucas v. *Board*, 44 Ind., 509, 541.

XI.

The opinion of the Supreme Court of Indiana affirmatively shows that no question was presented as to damage on account of an interference with easements. The only question, in any wise relating thereto, which plaintiffs in error presented, was that, as their easements lay outside the drainage district, there was no authority to exert the police power over the companies to the extent of requiring them to make compensation for bridges.

XII.

This is a case where, within the limits of the record itself, it affirmatively appears that if there was any erroneous declaration of law, such declaration was not controlling, and the opinion itself discloses the state ground on which the judgment of the Supreme Court can be upheld, and this court will not reverse, since it would only result in the state Supreme Court retracting its supposed erroneous Federal declaration and limiting the case to a state ground.

Murdock v. *Memphis*, 87 U. S., 590; 22 L. Ed., 429, 444.

XIII.

The repealing clause found in the Drainage Act of 1907 was subject to construction; it has been held by the Indiana Supreme Court that, notwithstanding the Drainage Act, railroads must build their own bridges over drains, and this decision, presenting a question of mere local law in the construction of a statute, is not open to a review of this court.

Keokee, etc., Co. v. *Taylor,* 234 U. S., 224; 58 L. Ed., 1288;

Schaefer v. *Nerling,* 188 U. S., 516;

Chicago, etc., R. Co. v. *Luddington,* 175 Ind., 35, 41;

Arnett v. *State, ex rel.,* 168 Ind., 180, 191.

XIV.

The Indiana Drainage Act, as construed by the decisions of the Indiana Supreme Court, does not deny to railroad companies equal protection of the laws, and if there were otherwise any invidious distinction, yet the holding in the case at bar stands as justified under the doctrine of charter obligation.

Kentucky Railroad Tax Cases, 115 U. S., 321; 29 L. Ed., 414;

New York, etc., R. Co. v. *Bristol,* 151 U. S., 556; 38 L. Ed., 269.

XV.

The classification in a statute, wherein railroad companies, operating for profit, are required to construct their own bridges over water-courses, while a public corporation, whose bridges are built out of

exactions of taxation, and are not maintained for profit, is one which is substantial in character and in no wise illusory.

XVI.

There is a very clear distinction between the actual taking of lots and parcels of land owned by private individuals when condemned and taken for highways or ditches and cases where new highways or ditches are constructed across railroads. Private properties are actually taken and the owners are forever deprived of the use of the same, whereas the railway lines are not taken, but they continue in the full free use of the same as before, excepting only that they cease to have exclusive possession and use of the same. Their property is not taken but its use is modified to accommodate the new street or drain, and with that modification the railway continues to use it as before.

Chicago, B. & Q. R. R. Co. v. *City,* 166 U. S., 226;

Chicago, etc., R. R. Co. v. *Traubarger,* 238 U. S., 67;

C., B. & Q. R. R. Co. v. *Appanoose Co.,* 182 Fed., 291;

New York, etc., R. Co. v. *Rhodes,* 171 Ind., 521, 525.

XVII.

In controversies involving the exercise of the police power of the state the Federal Courts resolve every doubt in favor of the state decisions.

State v. *Towessnute,* 154 P., 805; 3 Cyc., 804.

XVIII.

The statutes regulating the drainage of wet and overflowed lands have long been recognized as valid in the State of Indiana as enactments coming within the police power of this state.

O'Reiley v. *Kankakee Valley Drainage Company*, 32 Ind., 169.

Zigler v. *Meyer*, 121 Ind., 99.

Gifford Drainage Company v. *Shroer*, 145 Ind., 572.

Bemis v. *Guirl Drainage Co.*, 105 N. E., 496.

XIX.

The Legislature of the State of Indiana provided for the establishment by the Drainage Commissioners of the drainage district, here in controversy. It was within the power of the Legislature of that state to delegate to the Drainage Commissioners the duty of determining, defining and establishing the drainage district. In determining upon the location for the outlet the judgment of the Drainage Commissioners was conclusive and not subject to review by this court.

Thompson v. *Ryan*, 183 Ind., 232, 238.

Bonfoy v. *Goar*, 140 Ind., 292.

Heick v. *Voight*, 110 Ind., 279.

Chandler v. *Beal*, 132 Ind., 596, 598.

Anderson v. *Baker*, 98 Ind., 587.

Meranda v. *Spurlin*, 100 Ind., 380, 382.

Meyer v. *Plotner*, 112 N. E., 901.

XX.

Railroad companies must change their tracks to meet the public convenience. If a change in the construction of same becomes necessary to the community welfare, health and convenience, the companies must make such changes at their own cost, even if such changes require the construction of bridges by the railroad companies, for which no compensation is made.

In this case the injury, if any, being indirect and consequential and the result of exercise of the police power, there was no taking, uncompensated obedience is a rule of such cases.

Chicago, Milwaukee & St. Paul Ry. Co. v. *City of Minneapolis,* 232 U. S., 430.

Chicago, Indianapolis & Western Ry. Co. v. *Connersville,* 218 U. S., 336.

Chicago, Burlington & Quincy R. R. v. *Drainage Comm'rs,* 200 U. S., 561.

New York & New England R. R. Co. v. *Bristol,* 151 U. S., 556, 567.

Chicago, Burlington & Quincy R. R. v. *City of Chicago,* 166 U. S., 226, 252, 255.

Chicago, Burlington & Quincy R. R. v. *Nebraska,* 170 U. S., 57.

Northern Pacific Ry. Co. v. *City of Duluth,* 208 U. S., 583, 597.

St. Paul, Minneapolis & Manitoba Ry. Co. v. *State of Minnesota,* 214 U. S., 497.

Detroit, Fort Wayne & Belle Isle Ry. Co. v. *Osborn,* 189 U. S., 383.

New Orleans Gaslight Co. v. *Drainage Com'n,* 197 U. S., 453, 462.

Atlantic Coast Line v. *Goldsboro,* 232 U. S., 548.

Hudson County Water Company v. *McCarther*, 209 U. S., 349.

Egen v. *Hart*, 14 Southern, 244.

In re Opinions of Judges, 69 Atl., 627.

Hagen v. *Reclamation District*, 111 U. S., 701.

Baumgartner v. *Hosty*, 100 Ind., 575.

Bedford v. *U. S.*, 192 U. S., 217.

Northern Transportation Co. v. *City*, 99 U. S., 635.

Gibson v. *United States*, 166 U. S., 269.

Scranton v. *Wheeler*, 179 U. S., 141.

Manigult v. *Springs*, 199 U. S., 473.

City of Valparaiso v. *Hagen*, 153 Ind., 337.

Chicago, etc., R. Co. v. *Ludington*, 175 Ind., 35.

Wabash R. R. Co. v. *Jackson*, 176 Ind., 487.

XXI.

The cost of the construction of bridges by the railroads over the channel of the ditch should in no wise be confounded with the value of the easements of the railroads at the point of intersection with the ditch, as they are entirely separate and distinct propositions. The drainage statute gives damages for injury to easements, but not for the construction of bridges, made necessary for the continued operation of railroads.

(See decision Circuit Court of Appeals, 8th District, in case of *Chicago, Burlington & Quincy R. R.* v. *Board of Supervisors*, 182 Fed., 291.)

XXII.

Plaintiffs in error, having made no claim in the *nisi prius* court or the Supreme Court of the State of Indiana for damages to easements, cannot for the first time raise such question in this court.

Appleby v. *City of Buffalo,* 221 U. S., 524-532.

XXIII.

As to whether the 1907 act repealed all former acts concerning the obligations of railroads to construct bridges, was not presented to the *nisi prius* or Supreme Court of the State of Indiana, it cannot now be raised here for the first time.

Hoyt v. *Sheldon,* 1 Black's Reports, 518.

ARGUMENT.

Charter Obligation Prevents Recovery for Cost of Bridges.

It was stipulated in the trial court that plaintiffs in error were organized, existing and operating, at the time of the institution of this proceeding, and since, under an Act of the General Assembly of Indiana concerning railroads, which went into force May 6, 1853, and the amendments thereto. (Printed Rec., p. 335.) Section 13 of that Act, being Section 5195, Burns 1914, and which is still in force, provides as follows:

> "Every such corporation shall possess the general powers, and *be subject to the liabilities and restrictions* expressed in the special powers following: * * * Fifth: To construct its road upon or across any stream of water, watercourse, highway, railroad or canal, so as not to interfere with the free use of the same, which the route of its road shall intersect, in such manner as to afford security for life and property; but the corporation shall restore the stream or water-course, road or highway, thus intersected, to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchises."

In the brief of plaintiffs in error the court will observe that the question as to whether they are entitled to compensation for the secondary and consequential damage to them which grows out of the necessity of building bridges, in order to restore their lines, is argued as if the whole question were as to whether, in the absence of any statute, there

would be a right to compensation for what they contend was, in effect, a taking of their property. On the other hand, defendants in error contend, among other grounds, that the companies cannot have compensation for bridges because, under the above statute, it was a matter of charter obligation that they bear the expense occasioned by the drain crossing their rights of way, and that, under said statute, plaintiffs in error cannot now be heard to say, as against the state, whose grants are never construed *contra proferentem,* that the duty to restore the crossing by a bridge, made necessary to enable each of plaintiffs in error to continue to enjoy its franchise, shall not be devolved upon them.

> "The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt must be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."
>
> *Northwestern Fertilizing Co.* v. *Hyde Park,* 97 U. S., 659; 24 L. Ed., 1036, 1038.

It will be observed that the statutory provision above quoted, if it applies to new highways, streams and water-courses, represents the very antithesis of the idea that the public is to restore, and since the statute, in its reference to any stream of water, water-course or highway, puts all into the same class, so far as non-interference and the duty of restoration are concerned, it results that the construction given this statute by the Indiana Supreme Court in

respect to highways must be applicable to, or at least not out of accord with, the law in respect to streams of water and water-courses. Owing to the manner in which the subjects-matter of this statute have been linked together by Indiana decisions, including the decision in the case at bar, we shall attempt with some particularity first to show the views that the Indiana Supreme Court have expressed concerning the effect of that statute as applied to new streets and highways constructed across existing railroads, and we shall then show the later development of the same doctrine as applied to public drains.

In *Louisville, etc., R. Co.* v. *Smith,* 91 Ind., 119, 121, the contention of the company was that the statute did not relate to highways laid out and opened after the construction of the railroad, but the court said:

> "Whether the highway is laid out and opened before or after the construction of the railroad, the legislative intent in the clause quoted is clear, we think, that the railroad company shall construct its road, at its intersection with such highway, 'in such manner as to afford security for life and property.' "

In *Evansville, etc., R. Co.* v. *State, ex rel.,* 149 Ind., 276, 279, it was declared that the duty to restore the highway is imposed by statute in Indiana, and also exists independently, the court adding, "This duty of railroad companies is the same whether the highway was laid out and opened before or after the railroad was built."

In *Lake Erie, etc., R. Co.* v. *Shelley,* 163 Ind., 36, it was held that it was the duty of a railroad com-

pany to construct and maintain a highway crossing, although the way was established after the railroad was built, and that the company was not entitled to compensation for the expense either of constructing or maintaining the crossing.

In *Southern Ind. R. Co.* v. *McCarrell,* 163 Ind., 469, 473, the court declared:

> "The duty of reestablishing and maintaining at crossings pre-existing safe and convenient situations is statutory, *is an implied covenant in the charter contract,* and can not be laid aside or upon the shoulders of another. It is a duty the company cannot abdicate while exercising its franchise."

In *Vandalia R. Co.* v. *State, ex rel.,* 166 Ind., 219, it was held that, by virtue of the statute above quoted, the duty was "imposed by appellant's charter" to make safe and convenient crossings at all highways, whether the highways were established before or after the construction of the railroad.

In *Cincinnati, etc., R. Co.* v. *City of Connersville,* 170 Ind., 316, which was a condemnation proceeding, the extension of a new street through the company's embankment, at a point outside the limits of the city when the railroad was constructed, occasioned the necessity of building a railway bridge. The trial court instructed that the company might recover its damages for the use of its easement and for the taking of the earth composing its embankment at the point of intersection, but refused to instruct that the company was entitled to compensation for the cost of the railway bridge. On appeal to the Supreme Court of Indiana the question was squarely up as to whether the company was entitled to compensa-

tion for building the bridge, and the question was determined by that court in the negative, the court resting the proposition on the statute.

At this point we may for a moment digress from our effort to trace the Indiana street and highway cases to call attention to the fact that the case last referred to went on writ of error to this court, and is reported, under the same title, in 218 U. S., 336, 54 Law Ed., 1060. The judgment of the Indiana Supreme Court was here affirmed, and while the decision of this court was largely placed on the police power, yet the court said:

> "The railway company *accepted its franchise from the state, subject necessarily to the condition that it would conform at its own expense to any regulations,* not arbitrary in their character, as to the opening or use of streets, which had for their object the safety of the public, or the promotion of the public convenience, and which might from time to time be established by the municipality, when proceeding under legislative authority, within whose boundaries the company's business was conducted."

Again taking up the Indiana cases, we have next to call attention to *New York, etc., R. Co.* v. *Rhodes,* 171 Ind., 521, 525. That case also recognizes the view that, under the statute, the company was not entitled to recover for the construction and maintenance of the crossing of a new highway with its right of way, and that the company could not recover compensation for the additional expense of building cattle guards, and wing fences. The court said:

> "Having accepted the privileges and francises from the state and acquired its right of way subject to such right under said statute on

the part of the state it is not entitled to any compensation for the interruption and inconvenience, if any, nor for increased expense nor increased risk, if any, nor for the expense and inconvenience of the railroad company in complying with the requirements of said statutes as to highway crossings. (Citing cases.) Said subdivision five of Sec. 5195, *supra*, does not depend for its validity upon the police power of the state, but is valid because the state has the power to provide the conditions upon which railroads acquire their rights of way in the State, and such conditions are binding whether the right of way be acquired by deed, condemnation or otherwise."

In *Pittsburgh, etc., R. Co.* v. *Gregg*, 181 Ind., 42, 53, which was a proceeding to open a highway across the right of way of a railroad company, the position of the Indiana Supreme Court concerning Sec. 5195, *supra*, and on the general implication from the legislative grant of the power to a corporation under the act of which that section is a part, finds expression in the following language:

"In *New York, etc., R. Co.* v. *Rhodes* (1909), 171 Ind., 521, 525, 86 N. E., 840, 24 L. R. A., (N. S.), 1225, it was held that a railroad company having accepted the privileges and franchises from the state and acquired its right of way subject to the right of the state to locate and maintain its public highways (Subd. 5, Sec. 5195, Burns 1908, Sec. 3903, R. S., 1881), is not entitled to any compensation for the interruption and inconvenience, if any, nor for increased expense nor increased risk, if any, nor for the expense and inconvenience of the railroad company in complying with the requirements of such statute as to highway crossings. Even in the absence of such a statute as Sec. 5195, *supra*,

> the rule is that a private corporation which acquires a right to construct a railroad, takes it subject to the dominant right of the state to cross its railroad whenever the public necessity demands that new roads or streets shall be opened. In accepting a grant from the State, the private corporation impliedly agrees that the sovereign right to provide necessary highways for citizens of the state shall not be impaired."

Having now developed the Indiana holdings as respects its being a matter of charter obligation, under the railroad act, that the company bear all expenses which are incident to the new highway crossing, we shall go back somewhat in the Indiana cases, to show that the position of the Indiana Supreme Court that compensation cannot be awarded railroad companies for the expense of constructing bridges over public drains extended across their rights of way has also been based, in part at least, on charter obligation, either as a matter of construction of Sec. 5195, *supra,* or on what may be termed a common law implication from the character of the grant. The first of the drainage cases we have to refer to is *Chicago, etc., R. Co.* v. *Luddington,* 175 Ind., 35, where the court said:

> "The controlling question is whether a railroad company acquires its right of way subject to the right of the state to extend public ditches across it, and subject to the condition that it must place, keep and maintain its road across said public ditch in such condition as not unnecessarily to impair the usefulness or interfere with the free use of said ditch. It is urged by appellant that it did not acquire its right of way subject to any such condition. Subdivision five

of Sec. 5195 Burns 1908, Sec. 3903 R. S. 1881, and Sec. 7683 Burns 1908, Acts 1905, p. 581, Sec. 35, are cited by appellant as controlling this question. Said subdivision reads as follows: 'To construct its road upon or across any stream of water, water-course, road, highway, railroad or canal, so as not to interfere with the free use of the same, which the route of its road shall intersect, in such manner as to afford security for life and property; but the corporation shall restore the stream or water course, road or highway, thus intersected, to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchises.' Said Sec. 7683 is substantially the same. It is settled law in this state, that it is the duty of a railroad that crosses a highway or watercourse to restore it to its former condition of usefulness and safety, even in the absence of any express statutory requirement. (Citing cases)."

At page 40 of the above opinion the following language is used:

"It is evident that, in proceedings to establish a public ditch across the right of way of a railroad, the railroad company is not entitled to any damages for the cost and expense of complying with the requirements of subdivision five of Sec. 5195, *supra*, and Sec. 7683, *supra*, for the reason that it acquired its right of way subject to the right of the state to extend public ditches as well as public highways across said right of way, and subject to the condition that it must place, keep and maintain its road across said public ditch, regardless of whether said public ditch was constructed before or after the road was built, in such condition as not unnecessarily to impair the usefulness of said ditch, and 'so as not to interfere with the free use' thereof."

The next Indiana case upon the subject is *Wabash R. Co.* v. *Jackson*, 176 Ind. 487. In that case *Chicago etc. R. Co.* v. *Luddington, supra,* was followed upon the proposition of the company bearing the expense of providing its own railroad crossing at the intersection of the new drain, and the court said:

> "Appellant received and exercised its franchise subject to both the common law and the statutory power to require it to perform the duty imposed upon it by this proceeding."

DECISION IN CASE AT BAR FOLLOWS DOCTRINE OF CHARTER OBLIGATION.

As we shall hereafter show, the only question of damages which was before the Supreme Court of Indiana in the case at bar was the question of awarding damages for railway bridges, and we have now to point out that whatever may have been said by the court as to the police power, yet it appears that the court further rested its judgment on what would be a state ground, viz: the construction of the railroad statute. Turning to page 514 of the record for that portion of the opinion to which we desire to direct attention, it will be found that the court used the following language:

> "In the recent cases of *Chicago etc. R. Co.* v. *Luddington,* 175 Ind. 35, and *Wabash R. Co.* v. *Jackson, supra,* the *exact question* here presented was decided by this court adversely to appellant's contention, holding that the same rule applied to the construction of drains, as that of highways. In each of those cases the authorities on the subject of the right to have damages awarded have been fully collated, and commented upon, and *support the judgment in this case.*"

If the Ludington case and the Jackson case, both charter obligation cases, as we have shown, "support," as the court says, "the judgment in this case", then it appears that the court has put its decision on at least one local ground, namely, the construction of the Indiana statute.

Should it come to a matter of inference, however, a proposition we in nowise concede, then this court will not, in order to take jurisdiction and reverse the judgment of the state court which may be controlled by a matter of state law laid down in the cases which the court cited as supporting its judgment, assume that the possible Federal question was the single and altogether controlling one, and particularly will the court not do this in disregard of the record proper, aside from the opinion, which shows that a state statute was of controlling importance in the case.

See *Johnson* v. *Risk*, 137 U. S. 300, 34 L. ed. 683.

INDIANA DECISIONS ON CHARTER OBLIGATION CONCLUSIVE.

Having shown that the decision of the Indiana Supreme Court in the case at bar is, by express reference, interlocked with its prior decisions on the matter of charter obligation, we have next to assert that the power of the court of last resort in the state to interpret the statutes of its own state is ordinarily controlling and decisive, and it may certainly be affirmed that an interpretation of a local statute, constituting the basis of mere contractual rights, which interpretation, even if wrong, has a

sufficient basis in reason to protect it from the claim that it is an utterly unreasonable, and therefore an arbitrary interpretation, is not to be disregarded by this court, even if it result in depriving the complaining parties of a right to compensation they might otherwise possess. But the interpretation in this instance has the high authority of this court for its warrant, at least to the extent of holding that it is admissible for the state court to take the view that it is a matter of charter obligation for a railroad company to permit the public to intersect its right of way with a public highway or waterway without making compensation for the expense of putting the crossing in condition for the continued use of the railroad. We would strongly impress upon the mind of the court the fact that in *Cincinnati, etc., R. Co.* v. *Connersville,* 218 U. S., 336, the Indiana construction of Section 5195, *supra,* was upheld as against Federal objection.

There is, however, a very late case in this court which practically determines this case in our favor. The case we refer to is *Chicago, etc., R. Co.* v. *Minneapolis,* 232 U. S., 430, 58 Law Ed., 671.

In the above case, which was a proceeding in error, this court affirmed the Supreme Court of Minnesota in a holding that it was competent for a city, by a condemnation proceeding, to connect two lakes, situate in a park, by a waterway having walks on either side, the work as projected crossing the right of way of a railroad company, and necessitating the construction of a railroad bridge, without making compensation for the cost of the bridge. The court based its holding largely on the admissibility of the

view of charter obligation, and quotes at length from the prior case of *State ex rel. Minneapolis* v. *St. Paul, etc., R. Co.*, 98 Minn., 380, as evincing the Minnesota doctrine on that subject, and the court also quotes from the case of *Cincinnati, etc., R. Co.* v. *Connersville*, 218 U. S., 336, which, as shown, involves the Indiana statute.

If it be true that under a charter obligation the state, through an appropriate public agency, can compel a railroad company to submit to the making of an opening in its embankment which will necessitate the building of a railroad bridge, awarding no compensation for the bridge, where a combined foot and water way is laid out across the tracks of the company for the mere purpose of enhancing the value of a park, is it not altogether clear that the state may, under a like charter reservation, carry a drain across a railroad right of way without having the burden of constructing and maintaining a railway bridge, where the purpose of the drain is not only to reclaim a great marsh, and to improve public highways, but also to *benefit the health* of the inhabitants of populous cities whose boundaries lie adjacent to or near the marsh area?

The public character of drainage proceedings and their importance, as viewed by the court whose judgment is here sought to be reviewed on error, is well expressed in the *Luddington* case, *supra* (175 Ind., 35, 38), in the following language:

> "Public ditches established under the laws of this state are public ditches of the state, and, like public highways established under the laws of this state, are under the full control of the Leg-

islature. The construction and repair of public ditches under the laws of the state, like the establishment and improvement of public highways, are matters of public or state concern, and the exercise of a state function. *State ex rel.* v. *Board, etc.* (1908), 170 Ind., 595, and cases cited. As was said in the case of *State ex rel.* v. *Fox* (1902), 158 Ind., 126, 135, 136: 'There are important powers delegated to municipalities which concern every citizen of the state, and for the proper exercise of which the state cannot abdicate responsibility by committing them to local officers. * * * In every matter which affects the safety, morals, health, or general welfare of the people at large, or of a considerable number of them, there is undoubtedly reserved in the state the power to supervise, control, and even coerce, local officers in the discharge of public duties, and even to send its own agents into any organized district, if necessary, to enforce a public right, or accomplish a public benefit. For instance, every citizen has the right to travel the public highways—those in cities and towns, where, according to common usage, they are made, dug up, and improved by local action, as well as those in rural districts. In every part of these highways the traveler is entitled to the state's protection from violence, and from dangerous situations. For the preservation of public health, for the prevention of disease and epidemics, each inhabitant has an interest in the proper drainage of lands, and in the suppression of all insanitary conditions, whether rural or urban, and without regard for territorial boundaries, and the right to look to the state for protection against these evils so far as the same may be legally accorded. Likewise the enforcement of the state's criminal and revenue laws is of equal importance to all. In all these, and kindred things, the setting up of corporation lines forms no barrier to the

strong arm of the state in safeguarding every public interest.'"

This court has said:

"It is not open to doubt that it is in the power of the state to require local improvements to be made which are essential to the health and prosperity of any community within its borders. To this end it may provide for the construction of canals for draining marshes and malarious districts and of levees to prevent inundations, as well as for the opening of streets in cities and of roads in the country."

Hagar v. *Reclamation District,* 111 U. S., 701; 28 Law Ed., 569.

And again this court has said:

"The power [to reclaim swamp lands] does not rest simply upon the ground that the reclamation must be necessary for the public health. That indeed is one ground for interposition by the state, but not the only one."

Fallbrook Irrigation District v. *Bradley,* 164 U. S., 112; 41 Law Ed., 369, 390.

PRIOR INDIANA CASES NOT DISTINGUISHABLE ON GROUNDS STATED BY PLAINTIFFS IN ERROR.

We have been at the pains to refer to the Indiana adjudications concerning new highways crossing railroads because the doctrine declared by the Indiana Supreme Court in the case at bar concerning drains crossing railroads is linked by the court with the doctrine concerning highways intersecting railroads. In each case duties imposed upon railway companies may be said to rest, at least in part, on a statute, having two stems precisely similar in char-

acter and rooted in the same legislative enactment, and what the statute means for one purpose it means for the other. The statutory obligations are interlocked by the Indiana cases generally, and, as observed, by the case at bar, and the doctrine being the same in both instances, we have to point out that all new highways extending across railroads are carried across at new points of intersection, and therefore the charter requirement cannot be limited to points of crossing at which there was reason to anticipate the necessity for a new crossing, and so, as applied to drains, the statute, if it is to apply to future drains at all, must apply to any and all routes of drainage which may afterwards be determined on by the duly constituted authorities.

Counsel for plaintiffs in error seek to distinguish *Chicago, etc., R. Co.* v. *Luddington,* 175 Ind., 35, and *Wabash R. Co.* v. *Jackson,* 176 Ind., 487, on the ground that the case at bar involves the construction of a new channel, due to the diverting of the water from the river directly to the lake, instead of sending the waters to the lake by the long, tortuous and interrupted route which before existed.

It is said by counsel of the *Luddington* case that it is shown that the culvert was in the drainage district because the company was assessed with benefits. It does not follow from this that there was a stream or water-course where the new bridge would be required, and the third paragraph of the opinion states unrestrictedly that, "The controlling question is whether a railroad company acquires its right of way subject to the right of the state, to extend public ditches across it," and it is to be observed that on

page 39 of the opinion it is stated that "What was said by this court in the case of *New York, etc. R. Co.* v. *Rhodes,* 171 Ind., 521, 524, in regard to public highways applies with equal force to public ditches," and the court proceeds to quote from page 524 of the *Rhodes* case the holding that "Under the statutes of this state, it is the duty of all railroad companies to construct and keep in safe condition *all* highway crossings; and this duty is the same whether the highway was established before or after the railroad was built," citing Sec. 5195, *supra.* This ought to put an end to the contention that the Indiana Supreme Court has not in the case at bar, by its reference to the *Luddington* case, determined, as a matter of construction of the Indiana statute, that it applies to all public drains whenever and wherever constructed.

It may be true that the case of *Wabash R. Co.* v. *Jackson,* 176 Ind., 487, involved the enlargement of an existing waterway, but the court nevertheless refused, on the ground of charter obligation, to uphold the Company in any of its contentions, and affirmed a judgment which involved the Company in an expenditure of $8,000 for a culvert, to produce a total benefit of $927.97.

Again taking up the opinion of the Indiana Supreme Court in the case at bar, and looking at it merely for the purpose of finding in the opinion an expression of the mind of the court as to what had theretofore been determined by it on the subject, and we observe that the court said of the two cases last cited that in them "the *exact question* here presented was decided by this court adversely to appellants'

contention, holding that the same rule applied to the construction of drains, as that of highways."

It therefore appears that there is a settled doctrine in Indiana concerning Section 5195, *supra,* which is recognized in the opinion in the case at bar, as applicable to all drains crossing railroads, and this construction, as we contend, involves a mere matter of the construction of local law, which, since it does not impinge on any Federal limitation, is not within the competency of even this tribunal to disturb. The decision in the case at bar is as effectual as any other to determine the meaning of Sec. 5195, *supra,* and since this case declares that the *Luddington* and *Jackson* cases decide the *"exact question here presented * * * and support the judgment in this case"* the question is settled so far as this court is concerned.

Due Process of Law Not Denied.

There is a constant assumption in the brief of plaintiffs in error that the Indiana Supreme Court denied them compensation for the value of their easements, as well as for the cost of railway bridges. We undertake to say that, at least, as the question reached the Supreme Court of the State, the record involved no open question concerning the value of such easements, and we also insist that the language of the court is to be interpreted in the light of the record. The special findings show with precision the exact manner and circumstances in which the drain will cross the several railroads and the finding of the trial court is in each instance that the Company will not be damaged. All of the evidence which

plaintiffs in error offered relative to damages went solely and alone to the matter of the cost of bridges, and the trial court was justified, under the well considered case of *New York, etc. R. Co.* v. *Rhodes,* 171 Ind., 521, in finding, *as a fact,* since it was evident that the drainage and the railway easements could co-exist without in anywise interfering with each other, that there was no damage to the railroad companies by reason of the intersection of their respective easements. *Chicago etc. R. Co.* v. *Board,* 182 Fed. 291 297. A railroad company not being entitled to damages for either the building or maintenance of a bridge which it had covenanted to build and maintain by its acceptance of its charter, may or may not be further entitled to damages on account of its easement, but whether damages were substantial or negligible, or did not exist, would be a question of fact in the particular case. In *Chicago, etc. R. Co.* v. *Chicago,* 166 U. S., 226; 41 Law ed., 979, this court refused to review on error a judgment of the Illinois Supreme Court affirming the judgment of a trial court in a street opening proceeding wherein judgment had been rendered, on the verdict of a jury, fixing the just compensation of private lot owners but awarding to the railroad company the sum of one dollar as and for its damages for the taking of its easement. The judgment of the Illinois Supreme Court was here affirmed, and there is much in the opinion going to show the inconsequential character of the railroad company's damage in such cases which it would be profitable to quote here, but considerations of space preclude us from doing more

than setting out the central point in this court's opinion, which is found in the following excerpt:

> "To this it may be added that Congress has provided that the final judgment of the highest court of a state in cases of which this court may take cognizance, shall be re-examined upon writ of error, a process of common-law origin, which removes nothing for re-examination but questions of law arising upon the record. *Egan* v. *Hart*, 165 U. S., 188. Even if we were of opinion in view of the evidence that the jury erred in finding that no property right, of substantial value in money, had been taken from the railroad company by reason of the opening of a street across its right of way, we cannot, on that ground, re-examine the final judgment of the state court. We are permitted only to inquire whether the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the company's right to just compensation."

In *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S., 86; 53 Law ed., 417, 424, this court stated:

> "The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities, and privileges of Federal origin, specifically set up in the state court, and denied by the rulings and judgment of that court. U. S. Rev. Stat. Sec. 709; U. S. Comp. Stat. 1901, p. 575. Nor does this court sit to review the findings of fact made in the state court, but accepts the findings of the court of the state upon matters of fact as conclusive, and is con-

> fined to a review of questions of Federal law within the jurisdiction conferred upon this court."

So it was said in *Thayer* v. *Spratt*, 189 U. S., 346; 47 Law ed., 845, 849:

> "But, however this may be, we are precluded by the finding of facts in the state court from looking at the evidence upon which such findings may rest. Upon a writ of error to a state court this court has no right to review its decision upon the ground that the finding was against evidence or the weight of evidence."

There is nothing in the record in the case at bar to show that the matter of an award of damages for and on account of injury to easements, separate and apart from the matter of damages for bridges, was ever submitted to the trial court, or that there was any evidence, given or tendered, on which such award of damages for the easements might have been based. On the contrary, the printed record shows that the contention in the trial court was over damages for bridges, and the opinion of the Supreme Court, when carefully read, shows that that court treated as the sole question involved the question as to whether an allowance should be made on account of the latter item.

The record shows that plaintiffs in error each remonstrated for damages, and on all questions of damage they had the burden. Certain of the land owners assessed also remonstrated against the awards to the railroad companies by the commissioners. The evidence shows that the drain would cross each of the railroad rights of way at substan-

tially a right angle, and that not more than two tracks would be crossed in any instance. In view of this, and of the further fact that the franchises and railway easements would not be interfered with, the trial court was justified in determining that there was no damage (*New York, etc. R. Co.* v. *Rhodes,* 171 Ind., 521), in which event no Federal question would exist. Upon the matter of damages plaintiffs in error offered no evidence except as to bridges, and even if the court was authorized to treat the report of the drainage commissioners as evidence, yet it was clearly required to disregard their findings on these items of damage, since the excessive awards were plainly based on the theory that the companies were entitled to damages for bridges, and there being no separate evidence as to the value of the easements, the report on that point would fall as an entirety.

In the light of the record in the trial court the opinion of the court on appeal is to be examined, and the court should assume that any possible generality of language was used with reference to the facts of the case as disclosed by the record. The only language in the opinion which might with any color of propriety be said to have denied compensation for the easements is this statement, found on page 514 of the printed record:

> "It has been decided by this court that the construction of drains and highways and the taking of property for such purposes is within the police power of the state."

We have already pointed out that there was no evidence on which to found a claim of damages for

an interference with the easements, and therefore it may be assumed that the court was proceeding in the making of its declaration of law under a rule declared in *Lucas* v. *Board*, 44 Ind., 509, 541, where, in answer to a contention that a certain point had been decided in the *Dartmouth College* case, the court said:

> "It may be well to state, in view of these authorities *and as* applicable to all cases decided by any court that the language used in an opinion is always to be restricted to the case before the court."

But while this would seem to dispose of the question, let us look more critically at the opinion. Point four, representing presumably one of the contentions of plaintiffs in error, was, "Appellants' railways *not being within the drainage district* are not subject to the police power of the state." (Printed Rec., 514.) Then turning to the language immediately preceding that which we have first above quoted, we find it stated:

> "It is further contended by appellants that as the line of their easements *are not within the proposed drainage district they are not subject to the police power of the state,* but the matter is referable to the eminent domain power, *and that appellants are entitled to damages* [not for their easements] *for the construction of bridges occasioned by the drain.*"

In this succinct statement will be found the whole contention of plaintiffs in error in the court below, and it certainly must be said that a taking, prescribed by charter and provided for by Section 7683,

Burns, 1914, also prescribing the duties of railroads as to non-interference with streams and water courses, is within the police power so far as the exertion of that power may occasion secondary and consequential damages on account of bridges, but it is after the announcement of the rule by the court that it takes up and delimits the question before it, by stating that the *Luddington* and *Jackson* cases (both charter obligation cases, having solely to do with bridges or culverts) decide "the *exact question here presented* * * * *and support* [not a single conclusion involved, but] *the judgment in this case.*" After using this language the court refers to a Minnesota case, cited with approval by this court, as holding that the "*cost of maintaining a bridge*" did not require compensation to be made.

If, however, the view is to be taken that the court, in using the language first above referred to, was dealing with the abstract doctrine, then we affirm that in the sense in which the contention was made, namely, that the "railways, not being within the drainage district, are not subject to the police power," the statement was correct that the taking was by virtue of the police power, although it is not to be understood from this that in the exertion of the power it may not, in some circumstances, be necessary to couple with it the power of eminent domain. It was said in *Zigler* v. *Menges,* 121 Ind., 99, 103:

> "Our own cases, already cited, refer the authority to direct the drainage of wet lands to the police power of the state, and in so far as the drainage does promote the health, comfort

and convenience of the public, it is by virtue of this great power that the authority is exercised."

It must be remembered that in such a case as this it is the fact that the requirement is attributable to the police power which makes the taking for a public purpose, thus justifying the exercise of the power of eminent domain to accomplish one of the details of the general end. The general idea which we have that the language used in the case at bar may be attributed to the source, rather than to the incidents of the authority is, in a degree, illustrated by the special assessment case of *Edwards* v. *Cooper,* 168 Ind., 54, 66, where the court said:

"The right to provide drainage for the benefit of a locality rests in the police power of the state, and *the exertion of the authority* involves an exercise of the power of taxation."

Suppose, however, we take the worst view of the situation, and assume that the opinion does, in effect, deny compensation for the easements, then we say that, as the amount of the damage, if any, was a question of fact, on which plaintiffs in error had the burden of proof, the Supreme Court of Indiana, which has no jurisdiction to determine questions of fact, could not have reversed in any event, and therefore the declaration was harmless, and this court is concluded by the state of the record in the court below.

In *Murdock* v. *Memphis,* 87 U. S., 590; 22 Law Ed., 429, 444, this court said:

"But when we find that the state court has

> decided the federal question erroneously, then to prevent a useless and profitless reversal, which can do the plaintiff in error no good, and can only embarrass and delay the defendant, we must so far look into the remainder of the record as to see whether the decision of the federal question alone is sufficient to dispose of the case, or to require its reversal; or on the other hand, whether there exist other matters in the record actually decided by the state court which are sufficient to maintain the judgment of that court, notwithstanding the error in deciding the federal question. In the latter case the court would not be justified in reversing the judgment of the state court. But this examination into the points in the record other than the federal question is not for the purpose of determining whether they were correctly or erroneously decided, but to ascertain if any such have been decided, and their sufficiency to maintain the final judgment, as decided by the state court. Beyond this we are not at liberty to go, and we can only go this far to prevent the injustice of reversing a judgment which must in the end be reaffirmed, even in this court, if brought here again from the state court after it has corrected its error in the matter of federal law."

It is claimed, however, that the drainage statute of 1907 gives compensation for easements, and that it contains a general repealing clause.

> "A repealing clause, like any other provision of the statute, is to be subjected to rules of construction, and the intent will prevail over the literal import of the words."
>
> *Arnett* v. *State ex rel.*, 168 Ind., 180, 191.

It should not be assumed that it was the legislative intent to repeal all laws which might have some incidental relation to drainage, and it has been

expressly held in Indiana that the drainage statute does not require the making of compensation for bridges.

Chicago, etc., R. Co. v. *Luddington,* 175 Ind., 35, 41.

It is true that the Drainage Act of 1907 gives railroad companies damages for easements, but in view of the strong presumption against repeals of prior enactments, not in necessary conflict therewith, and having only an incidental relation to the later act, it was entirely competent for the State Court to conclude that the specific provisions of Section 5195, *supra,* were not repealed. Besides, it was not a case of denying compensation for easements affected, but it was a case in which the plaintiffs in error, who had and assumed the burden of proof, did not place the trial court in a situation where it might have proceeded to award damages for easements, and it is further to be observed that the state supreme court's decision, relative to the Fourteenth Amendment to the Constitution of the United States, is that the denial of compensation "for the cost of erecting and maintaining a bridge" does not violate such amendment. It surely was within the competency of the state court to decide that a statute giving compensation to railroad companies for damages to easements did not repeal a prior statute, or the common law, denying to such railroad companies damages for something entirely different from easements. As was said in *Chicago, etc., R. Co.* v. *Board,* 182 Fed., 291, 297:

"To hold that the public must bear the expense of constructing the bridges in question

is not to compel them to pay for something they have taken in constructing the ditch, but is to impose upon them the burden of constructing and maintaining the plaintiff's roads at the point of intersection."

This court will not go behind the construction given to the state law by the state court, and the opinion in the case at bar must be assumed to rest on a construction of the statute laws which would not violate any federal right.

Keokee, etc., Co. v. *Taylor,* 234 U. S., 224; 58 Law Ed., 1288.

EQUAL PROTECTION OF THE LAW NOT DENIED.

If the restoring and maintaining of the crossings of highways and drains is required of railroads as a matter of charter obligation, as is held in Indiana, there is no denial of the equal protection of the laws in requiring railroad companies to build bridges (*New York, etc., R. Co.* v. *Bristol,* 151 U. S., 556; 38 Law Ed., 269), and the fact that private land owners are given compensation for their lands or for an injury to their easements, does not afford any necessary reason why railroad companies should be allowed compensation for bridges. The requirement of the equal protection of the laws "only requires the same means and methods to be applied impartially to all the constituents of a class, so that the law shall operate equally and uniformally upon all persons in similar circumstances."

Kentucky Railroad Tax Cases, 115 U. S., 321; 29 Law Ed., 414.

As to the fact that injury to county bridges is compensated for under the Drainage Act, it may be said there is a sufficient basis for this classification, even apart from the consideration of the charter obligation of railroad companies. The fact that railroads are the subject of private ownership, and are operated for the profit of the stockholders of the company, while county bridges are built from the exactions of taxation, and are constructed for the public convenience, and not for the profit of the county, furnishes a basis for a legislative classification that is in nowise illusory. And besides, it may be inferred that these companies, engaged as they are, in operating East and West lines of railroads, which, since they have not been assessed for benefits, may themselves, in the individual case, be relieved of taxation in Lake County by the requirement that benefits must be applied toward the restoration of the bridges of the county, will themselves receive a benefit from the supposed discrimination.

Police Power.

Counsel for plaintiffs in error, on page 50 of their brief, state that "when property is properly taken under the police power, the state need not make compensation." This declaration on their part really renders unnecessary the discussion of the power of the trial court to require railroads to construct bridges at their own expense, but it will now be considered whether it may be required under the police power. Sections 5195 and 7683, Burns, 1914, furnish the basis of our claim that the police power has been exerted in this case.

The question here at bar has often been presented to this court, that is, whether the construction of crossings or highways over a railroad right of way, without compensation, for the incidental expense, is within the police power of the state. It has been repeatedly held by this court that if the laying out of a highway over the right of way should cause the railroad to construct viaducts or bridges, the same must be done at the expense of the railroads. One of the latest expressions of this court on the subject is in the case of *C. I. & W. Ry.* v. *Connersville,* 218 U. S., 336, 343, where the court says:

> "The question as to the right of the railroad to be reimbursed for any moneys necessarily expended in constructing the bridge in question, is, we think, concluded by former decisions of this court. * * * Without further discussion, we adjudge upon the authority of former cases, that there was no error in holding that the city could not be compelled to reimburse the railway company for the cost of the bridge in question."

The object of the drain in question is to conduct the waters of the Little Calumet river into Lake Michigan, at the point indicated, and is simply a highway for the purpose of passage of waters over the ridge of land separating Lake Michigan. If the railroads had not been laid at this point, there could be no possible objection to projecting said canal over said ridge into Lake Michigan, and we claim it can make no difference whether the railroads were constructed before or after the establishment of the ditch.

The question of whether there is a distinction between a highway for the passage of water and a

roadway for the passage of teams or other vehicles has been decided by this court in the very recent case of *Chicago, Milwaukee & St. Paul R. R.* v. *City of Minneapolis,* 232 U. S., 430, where it was held that the connecting of two lakes with a channel, which would pass through the right of way of the railroad, was within the police power of the state, and that no compensation should be awarded to the railroad for the construction of bridges over said channel, even though the object of the channel was to connect two lakes, as stated, for the passage of pleasure boats and crafts.

In that case this court, in passing upon this proposition, in part says:

> "It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their track or to carry their tracks over such highways. *N. Y. & N. E. R. R. Co.* v. *Bristol,* 151 U. S., 556, 567; *C. B. & Q. R. R. Co.* v. *Chicago,* 166 U. S., 226, 252, 255; *C. B. & Q. R. R. Co.* v. *Nebraska,* 170 U. S., 57; *Northern Pacific Ry. Co.* v. *Duluth,* 208 U. S., 573, 597; *St. P. Minn. & Man. Ry. Co.* v. *Minnesota,* 214 U. S., 497; *C. I. & W. Ry. Co.* v. *Connersville,* 218 U. S., 336, 343, 344. See also *Detroit etc. Railway* v. *Osborn,* 189 U. S., 383; *New Orleans Gaslight Co.* v. *Drainage Com'n,* 197 U. S., 453, 462; *C. B. & Q. Ry. Co.* v. *Drainage Com'rs,* 200 U. S., 561, 592, 593; *Atlantic Coast Line* v. *Goldsboro,* decided this day, post, p. 548."

Continuing, on page 440, this court says:

> "There can be no question as to the attitude of this court upon this question, as it has been

uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is a legitimate exercise of the power and not in violation of the constitutional inhibition against the impairment of the obligation of contracts."

"* * * No different rule could be applied because the highway was laid out in order to increase the advantages of a public park. In this aspect, it would be equally a crossing devoted to the public use (*Shoemaker* v. *United States*, 147 U. S., 282, 297); and we see no basis for a distinction in principle in the case of an intersecting public road opened under competent authority because such a highway might lead to public recreation grounds instead of to places of business, or might connect lakes instead of avenues."

"If there is a distinction in the present case, it must lie in the fact that the crossing is an artificial waterway instead of a road. But it is none the less a public highway, established to afford an appropriate place of public passage."

Continuing, on page 442, the court said:

"The case must be regarded as being one of a public crossing provided by law; and the authorities we have cited lead to the conclusion that the state, without infringing the guaranties of the Federal Constitution, could require the Railway Company to make suitable provision for carrying its tracks over the crossing without compensation."

That such proceedings, as the case at bar present, are within the police power, was again decided by this court in the case of *C., B. & Q. R. R. Co.* v. *Drainage Commissioners*, 200 U. S., 561, where on page 585 this court says:

> "We assume, also, without discussion,—as from the decisions of the state (Illinois) court we may properly assume—that the drainage of this large body of lands so as to make them fit for human habitation and cultivation, is a public purpose, to accomplish which the state may by appropriate agencies, exert the general powers it possesses for the common good."

It must be conceded in the case at bar, as the court held in the statement of facts, that the only practical way of draining said lands was through the Little Calumet into Lake Michigan across the sand ridge on which is located the rights of way of the railroads of two of the plaintiffs in error. It is impossible to carry the overflow of waters into Lake Michigan, within the confines of the State of Indiana, without crossing the rights of way of plaintiffs in error, and if their contention should prevail, this great body of land, surrounded by a more or less dense urban and surburban population, would stand forever as a menace to the health of the people of the State of Indiana. It must be admitted by plaintiffs in error that the object of these drainage proceedings is not in any sense arbitrary or unreasonable, and is for the public good, health and safety.

Uncompensated obedience to the regulations enacted therefor could in no sense be held as taking property without due compensation, as the constitutional prohibition against the taking of private property without compensation is not a limitation on regulations under the police power, where the tranquillity, health and prosperity of every well ordered community demands that same be done.

Further, in the case of *Chicago etc. R. Co.* v. *Drainage Commissioners,* 200 U. S., 561, on page 592, the court says:

> "We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. *Lake Shore & Mich. South. Ry.* v. *Ohio,* 173 U. S., 285, 292; *Gilman* v. *Philadelphia,* 3 Wall., 713, 729; *Pound* v. *Turck,* 95 U. S., 459, 464; *Railroad Co.* v. *Husen,* 95 U. S., 470."

Continuing, on page 593, this court further says:

> "**** Compensation has never been a condition of its exercise (police power) even when attended with inconvenience or peculiar loss, as each member of a community is presumed to be benefited by that which promotes the general welfare."

And, at the bottom of page 593, we find this expression:

> "If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the constitution."

In the case at bar, no charge is made against the railroad companies for benefits or for the construction of any portion of said ditch. The expense of removing the soil in the channel as it passes through the right of way of plaintiffs in error's railroads is borne entirely by the benefit fund, and, as stated before, there was no claim made by the railroads at the

time they made their offer to prove the cost of the bridges required to be constructed that any portion of such damages related to any of their easements.

The uncompensated obedience of those who are complaining of the exercise of police power of the state to drain lands is required in the case of *Barbier* v. *Connolly*, 113 U. S., 27; on page 31, this court says:

> "But neither the amendment (14th Amendment), broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits, for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects."

Plaintiffs in error requested the court to make a finding of facts, which it did, and in such findings, which are set out in plaintiffs in error's brief, we find,

> "12. That the proposed work will improve the public health."
>
> "13. That the proposed work and drainage will benefit public highways in Calumet Township, North Township, also public highways in the Town of East Gary and the public highways and streets in the city of Gary, in Lake County, and also public highways in Portage Township

and public highways in Westchester Township, in Porter County, Indiana."

"14. That the proposed work and drainage will be a public utility."

"15. That the proposed work, as decided upon and reported by the commissioners of drainage, will be sufficient to properly drain the lands and easements to be affected."

These findings of facts, independent of anything other than the statute, place the matter within the police power of the state.

The easement of a railroad is one proposition, and the construction of bridges that may be required over the line of a ditch is an entirely different proposition. Evidence was sought to be introduced only as to the value of the bridges, not damages to easements. The distinction between easements of railroads and a bridge over a drainage ditch is clearly set forth by decision of the U. S. Circuit Court of Appeals, 8th Circuit, in the case of *C., B. & Q. Ry. Co.* v. *Board of Supervisors,* 182 Fed., 291.

In discussing this very question, this court in part says:

"These (railroad) crossing cases come much nearer to violating the constitutional rights of railroads than does the uncompensated intersection of a public drain. They compel the railroad not only to maintain its road over the highway, but also to construct, often at great expense, a safe passageway for the sole use of the traveling public.

"If the drain here involved had existed when the railroads were constructed, the company would have been compelled to bear the expense of building a proper bridge over the ditch. Why should it not do so now? By simply constructing its line first, did the company forever

escape this burden, and acquire a vested right that no future public improvement should come that way except at the charge of rebuilding and maintaining the railroad at the place of intersection? *The construction of the ditch did not and could not 'take' a strip of the railroad. Notwithstanding the easement of the ditch, the company continued in the right to maintain and operate its road.* All the public required was that the company should carry its road over the ditch at its own expense and not at the expense of the public. *To hold that the public must bear the expense of constructing the bridges in question is not to compel them to pay for something which they have taken in constructing the ditch, but is to impose upon them the burden of constructing and maintaining the plaintiff's roads at the point of intersection.*"

Counsel, in the *nisi prius court,* made the distinction themselves when they made their offer of testimony as to the cost of the bridges to be constructed, in no instance offering to prove the value of the easement, evidently considering it had no market value.

Mr. Peterson, one of the counsel for plaintiffs in error, in the *nisi prius* court, used this language (Pr. Tr. of Record, 372) when he made the offer:

> "The remonstrant, Chicago, Indiana & Southern Railway, in response to the question asked the witness, offers to prove by the witness and he will testify, if permitted so to do, that the reasonable cost of the construction of such a bridge as is made reasonably necessary over the proposed ditch, at the point where it crosses said remonstrant's railroad, will be $60,000, and will cost $60,000 to construct such a bridge as will be reasonably safe for said remonstrant's railroad to operate trains over and across said proposed drain."

It appears again on page 373 (Printed Tr. of Record) when Mr. Peterson offered to prove damages to the Lake Shore & Michigan Southern Ry. Co., which offer was as follows:

> "We offer to prove by the witness in response to the question asked, and he will testify, if permitted so to do, that the reasonable cost of such a bridge as would be necessary and reasonably safe for the operation of trains over this proposed drain at the place where it crosses the railroad right of way, will be $135,000."

As to the Michigan Central Railway, on page 376 (Printed Tr. of Record), Mr. Peterson makes the offer in the following language:

> "The remonstrant, Michigan Central Railway, offers to prove by the witness, and says to the court that he will testify, if permitted so to do, that it will be necessary to reconstruct the bridge at the point above mentioned in the question and that the cost of making that bridge reasonably safe for the operation of trains over remonstrant's railroad, will be $30,000."

The question as now raised was not presented either to the trial court or to the Supreme Court of the State of Indiana. The contentions there presented are fully stated in the opinion of the Supreme Court of Indiana (Pr. Tr., page 512), where the court says the questions presented by the record in this case are:

> "1. Error in overruling appellants' demurrers.
> "2. Error in overruling appellants' motion to dismiss.
> "3. That the Calumet river being an interstate stream, the Porter Circuit Court had no jurisdiction over its course.

"4. Appellants' railways not being within the drainage district are not subject to the police power of the state.

"5. That the power to cut the ditch across appellants' right of way is referable to the Eminent Domain power and not the police power.

"6. That the Drainage Act of 1907 is unconstitutional and void, in that it allows the assessment of damages to Lake County, for injuries to bridges; to other corporations and persons for injuries to their property, while denying the same to appellants, and is in conflict with the Fourteenth Amendment to the Federal Constitution."

The question as to whether any section of the statute of the State of Indiana had been repealed by the drainage act has never been discussed or presented for review to the Supreme Court of Indiana, and, raising it now, it comes too late.

Hoyt v. *Sheldon,* 1 Black's Reports, 518.

We submit that the judgment of the Indiana Supreme Court should be affirmed, or that the writ of error should be dismissed.

Respectfully submitted.

JOHN H. GILLETT,
FRANK B. PATTEE,
RANDALL W. BURNS,
Attorneys for Defendants in Error.